

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CIVIL ACTION NO. 97-2892
 : :
 : CRIMINAL NO. 93-314-01
 : :
LOUIS AGNES : :

M E M O R A N D U M

BUCKWALTER, J

December 9, 1997

In 1995 Louis Agnes pled guilty to a violation of the Controlled Substance Act, and this Court sentenced him to 292 months imprisonment, based on an Offense Level of 36 and a Criminal History Score of V. On April 24, 1997, Agnes filed this pro se document on an official 28 U.S.C. § 2255 form requesting the Court to either grant him an extension of time to file a section 2255 motion, or to hold a section 2255 action in abeyance pending the resolution of three other such actions before three other judges in this district.

Agnes does not intend to challenge his underlying conviction in the above-captioned criminal matter, but rather his sentence. He does not argue that this Court sentenced him incorrectly, but that the criminal history score on which his sentence was based was in turn based on three constitutionally infirm convictions, each of which he is now challenging. Should he succeed in one or more of these challenges, he hopes to return to this Court and challenge his current sentence as based on an

improper criminal history score. He has filed this motion solely to protect himself against the one-year deadline which Congress recently imposed for section 2255 motions.¹

The government opposes his request, and it represents that one of his three other petitions was denied on May 5, 1997 (Agnes's request for a certificate of appealability in that case is apparently pending before the Court of Appeals), while the other two are pending before other district judges. Although the parties raise several interesting issues, the Court will not reach them at this point, because it finds that Agnes has not

1. 28 U.S.C. § 2255, as amended effective April 24, 1996 by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law No. 104-132, provides:

Federal custody; remedies on motion attacking sentence
A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

A 1-year limitation period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

- (1) the date on which the judgment of conviction becomes final;
 - (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
 - (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;
- or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of diligence.

presented the Court with either a section 2255 motion² or a justiciable controversy. Agnes may eventually challenge this sentence, but he is not now. Whether or not he actually does file a section 2255 motion in this Court is dependent upon the outcome of his three other section 2255 motions, and this Court obviously has no control over those cases.

In an unpublished opinion in the Southern District of New York, a petitioner requested an extension of time to file a section 2255 motion because he feared that his pending F. R. Crim. P. 33 motion would not be resolved until after the expiration of the one year deadline. United States v. Eubanks, 1997 WL 115647 (S.D.N.Y. March 14, 1997). The Eubanks court found the application to be "premature" and denied it without prejudice to the petitioner's "right to apply for an extension, and/or to argue for the tolling of any applicable statute of limitations, at such time when he files a section 2255 motion, setting forth his legal arguments for such extension or tolling." A more recently published opinion from the same court reached a similar conclusion. In the Matter of Wattanasiri, ___F.Supp.___, 1997 WL 716154 (S.D.N.Y. Nov. 14, 1997) ("[I]t is quite another matter in the ordinary case for a court to rule in advance that a

2. Accordingly the Court need not determine whether the motion itself is timely under section 2255. United States of America v. Valentin, 1997 WL 602771 at *1 (E.D.Pa. Sept. 19, 1997) (where petitioner's conviction became final over one year before AEDPA, court allowed a reasonable period of time, not to exceed one year, in which to file a section 2255 motion).

particular delay will or will not fall within the bar of the statute [of limitations].") The Court is persuaded by these cases that Agnes does not now present a case or controversy, and that determination of the timeliness of a motion he may or may not eventually file would merely constitute an advisory opinion. For the same reason, the court believes it would be inappropriate to hold the matter in abeyance; there is no matter to hold.

The Court will therefore deny the motion for an extension of time without prejudice. If Agnes obtains relief in one of his three pending 2255 actions, he may then file a section 2255 motion challenging his sentence. See, e.g., Calderon v. U.S. Dist. Court for the Cen. Dist. of Cal., ___F.3d___, 1997 WL 709900 (9th Cir. Oct. 29, 1997) (as amended on denial of rehearing and suggestion for rehearing en banc Oct. 29, 1997); Triestman v. United States, 124 F.3d 361 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997); Alvarez-Machain v. United States, 107 F. 3d 696, 701 (9th Cir.), cert. denied, ___U.S.____, 118 S.Ct. 60 (1997); In the Matter of Wattanasiri, supra at *3-4; United States v. Van Poyck, ___F.Supp.____, 1997 WL 655946 (C.D. Cal. Sept. 24, 1997). Like the Eubanks court, however, the Court expresses no opinion as to the merits of any future section 2255 challenge to the sentence in this matter, and it puts Agnes on notice that such a motion may be dismissed as untimely, in light of the circumstances and the applicable law.

An appropriate order follows.

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v.	:	CRIMINAL NO. 93-314-01
	:	
LOUIS AGNES	:	

O R D E R

AND NOW, this 9th day of December 1997, upon consideration of Louis Agnes's Motion for Extension of Time in which to file a Motion to Vacate his Sentence pursuant to 28 U.S.C. § 2255 (Dkt.# 89), the Government's Response in Opposition thereto (Dkt.# 91) and Agnes' Reply (Dkt. # 95), it is hereby ORDERED that the Motion is DENIED WITHOUT PREJUDICE, for the reasons contained in the attached Memorandum.

BY THE COURT:

RONALD L. BUCKWALTER, J.